CALIFORNIA STATE BOARD OF EQUALIZATION

CURRENT LEGAL DIGEST NO. 1067

January 16, 2005

100.0037.500 **Transfer of Photographs into External Computer Hard Drive.** A commercial photography studio (Studio) downloads digital photography from the Studio's computer hard drive to an external computer hard drive supplied by the Studio's client or by the client's agent. The Studio performs the transfer of the photography on its own premises or at another studio that is being rented for the production of the photography. When the digital transfer of the photographs is completed, the client or its agent takes possession of the computer hard drive it supplied. The Studio does not transfer any other tangible personal property containing the electronic photographic imagery, such as CD-ROMs, DVDs, or other electronic media or hard copies, to the client or its agent. Does such an electronic transfer of photography qualify as a nontaxable electronic transfer of artwork?

Under Regulation 1540(b)(2)(B), a transfer of artwork electronically is not considered a transfer in tangible form if:

> "… the file containing the electronic artwork is transferred through remote telecommunications (such as by modem or over the Internet), or if the file is loaded into the client's computer by the advertising agency or commercial artist, and the client does not obtain title to or possession of any tangible personal property, such as electronic media or hard copy."

In the above scenario, the photographs are transferred by the Studio to an external computer hard drive that the client provides to the Studio. Once the photographs are transferred onto this external hard drive, the hard drive is returned to the client or its agent. An external hard drive is a form of storage media as defined by Regulation 1502(b)(13). It is not a computer as that term is defined in subdivision (b)(2). For purposes of Regulation 1540(b)(2)(B), a file is considered loaded into the client's computer when an advertising agency or commercial artist transfers the file directly into the permanent storage memory of the client's computer. Therefore, the above transfer would not be considered an electronic transfer under Regulation 1540(b)(2)(B). Instead, the transfer of the photography onto the external hard drive provided by the client or its agent would be considered taxable fabrication labor of the storage media. 7/21/04. (2005-2).

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105.0071 **Common Carrier Use.** A common carrier purchases an aircraft, makes first operational use of the aircraft thereby starting the one-year test period, and the aircraft is added to the air carrier certificate of the charter operator who properly flys the aircraft under FAA Part 135 regulations. The aircraft is chartered and flown empty to pick up the

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passengers who board the aircraft. They are flown to their destination and then returned to the airport where they were picked up. The plane is then flown without passengers to the airport where it is based. The charter customer is charged for all the hours put on the aircraft including the two legs where the aircraft was flown without passengers. The common carrier asserts that the legs of the flight to pick up the passengers and to return the aircraft to its base airport qualify as common carrier/Part 135 use because the charter customer was charged for the flight time.

For purposes of the common carrier exemption from sales or use tax under Section 6366 and 6366.1, Regulation 1593(a)(2) defines a "common carrier" as:

> "…[A]ny person who engages in the business of transporting persons or property for hire or compensation and who offers his or her services indiscriminately to the public or to some portion of the public."

and under subdivision (c)(1)(C), a flight qualifies as common carrier use:

> "…only if the flight is authorized by the governmental authority under which the aircraft is operated and involves the transportation of persons or property. Where the aircraft does not itself transport the person or property to a location on the ground (or water), the flight does not qualify as a common carrier flight for purposes of the exemption."

Flights to position or reposition aircraft by flying the aircraft from one point to another (ferry flights) do not qualify as common carrier use (Regulation 1593(c)(1)(C)1.). In the above scenario, the legs of the charter flight where the aircraft is flown empty to pick up the passengers and then is ultimately flown without passengers to its base airport are considered to be ferry flights and do not qualify as common carrier use for purposes of the common carrier exemption. 7/21/04. (2005-2).

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190.0829 **Sale and Installation of Plantation Shutters**. Customers contract with Company A, a home-improvement retailer, for the sale and installation of plantation shutters for a lump-sum price. The plantation shutters are similar in form and function to venetian blinds or shades and therefore are considered to be fixtures. Company A arranges with an independent and unrelated subcontractor for the furnishing and installation of the plantation shutters for a lump-sum price. Since the subcontractor, not Company A, will actually furnish and install the plantation shutters, the subcontractor is the "contractor" referred to in Regulation 1521(b)(2)(B). In general, a subcontractor cannot avoid tax liability for tax on the sale or use of materials or fixtures furnished and installed by the subcontractor by taking a resale certificate from the prime or general contractor (Reg. 1521(b)(6)).

Therefore, the sale by Company A to its customer is not subject to tax when the subcontractor both furnishes and installs the plantation shutters. As the general contractor in

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the above scenario, Company A is neither the retailer nor the consumer of the materials and fixtures, and it may not properly collect sales tax reimbursement or pay the sales tax. The subcontractor is the retailer of the plantation shutters and must report and pay tax to the Board measured by the sale price of the fixture to Company A.

If the contract does not state the sale price, such as in a lump-sum contract, the sale price is deemed to be the cost price of the fixture to the contractor (i.e., the subcontractor in the above situation). If the subcontractor purchases the fixture in a completed condition, the cost price is deemed to be the sale price of the fixture to the subcontractor. If the subcontractor is the manufacturer of the fixture, the cost price is determined by additional standards set forth in Regulation 1521(b)(2)(B)2.b. 7/21/04. (2005-2).

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425.0416 **Hoveround Four-Wheeled Scooters.** Under Regulation 1591.2(b), electric three-wheel scooters that are similar in both design and function to a conventional electric wheelchair, qualify as a wheelchair for the purposes of Revenue and Taxation Code section 6369.2. The fact that the Hoveround scooter has a fourth wheel does not preclude it from qualifying as a wheelchair pursuant to section 6391.2 and Regulation 1591.2(b).

However, for electric scooters to qualify for exemption from tax, Regulation 1591.2(b) also includes two requirements: 1) the scooter must be sold to an individual for that individual's personal use; and 2) the individual's purchase of the scooter must be directed by a licensed physician. 7/30/05. 2005-2.

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